**OVERSEAS UNION BANK (MALAYSIA) BHD**

**v.**

**SOON FOOM (S) SDN BHD**

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[ORIGINATING SUMMONS NO: 24-433-99-I]
22 JULY 2000

***LAND LAW:*** *Charge - Order for sale - Application for - Whether cause to the contrary established*

The defendant accepted three banking facilities (an overdraft facility; bankers acceptance; letter of guarantee) offered by the plaintiff. All loans were payable on demand and as security, a charge of certain properties was executed. On 14 October 1999, the plaintiff through their solicitors demanded payment due under the said facilities. This was followed by the statutory demand pursuant to the Sarawak Land Code. The plaintiff then applied for an order for sale of the said property.

The defendant opposed the application of the order for sale arguing that the sum of RM6,000 which the plaintiff guaranteed payment was neither a loan nor an amount due and payable because the plaintiff had not been called upon to pay under the guarantee.

In order to determine whether the defendant had established cause to the contrary the court had to decide whether the letter of guarantee by the plaintiff amounted to a banking facility.

**Held:**

**[1]** From the terms of the letter of offer by the plaintiff, it appeared that the giving of the guarantee was in fact a banking facility. It was a sum repayable on demand within the meaning of the phrase of the letter of offer and was a contingent liability covered by the terms of the charge.

*[Plaintiff's application allowed.]*

**Case(s) referred to:**

*Baker v. Lloyd's Bank Ltd [1920] 2 KB 322* ***(dist)***

*Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor [1995] 2 MLJ 537* ***(dist)***

*Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608* ***(refd)***

*Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd [2000] 2 CLJ 73* ***(foll)***

*Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd [1999] 3 CLJ 47* ***(dist)***

**Legislation referred to:**
Rules of the High Court 1980, O. 83 r. 3(3), (6)

*For the plaintiff - Anthony Ngeh; M/s Chan & Gan*
*For the defendant - Lim Heng Choo; M/s Lim & Lim*

*Reported by Mariette Peters-Goh*

## JUDGMENT

**Ian HC Chin J:**

### Introduction

The defendant Soon Foom (S) Sdn Bhd opposed the present application of the plaintiff Overseas Union Bank (Malaysia) Berhad, made on 15 December 1999, for the sale of the property charged to it. The ground of opposition is that the plaintiff had failed to prove by affidavit evidence "the exact amount owing" by the defendant.

### The Facts And Contentions

On 17 April 1997 the defendant accepted the following banking facilities offered by the plaintiff, *viz*:-

| | | |
|---|---|---|
| (1) Overdraft for working capital and for redemption of properties from another bank | - | RM2,500,000 |
| (2) Bankers Acceptance/Trust Receipt/ Letter of Credit for working capital | - | RM500,000 |
| (3) Letter of Guarantee for supporting tender contracts and/or issuance of financial guarantees | - | RM100,000 |

All loans were repayable on demand and as security a charge of certain properties were executed for which the plaintiff now seeks an order of the court for sale. The plaintiff then on 14 October 1999, through their advocates, demanded payment for RM2,837,702.15, RM543,625.14 and RM16,000 due respectively under the said three facilities. The total sum demanded was RM3,397,327.29. This was followed for statutory demand, pursuant to the Sarawak Land Code, for payment of the total sum of RM3,412,195.41 which was due on 28 October 1999. The plaintiff then applied for an order of sale and gave the following particulars in the affidavit:

(I) **In respect of the Overdraft Facility**

| | |
|---|---|
| (a) Total amount of loan advanced | RM2,500,000 |
| (b) The amount of the repayment as at 15.12.1999 | Not applicable |
| (c) The amount of overdue interests as at 15.12.1999 | RM435,623.61 |
| (d) The total amount remaining due as at 15.12.1999 | RM2,885,623.61 |
| (e) The amount of daily interest with effect from 16.12.1999 | RM747.18 |

(II) **In respect of the Bankers Acceptance/Trust Receipt (90 days)/Letter of Credit**

| | |
|---|---|
| (a) Total amount of loan advanced | RM500,000 |
| (b) The amount of the repayment as at 15.12.1999 | Nil |
| (c) The amount of overdue interests as at 15.12.1999 | RM52,832.38 |
| (d) The total amount remaining due as at 15.12.1999 | RM552,832.38 |
| (e) The amount of daily interest with effect from 16.12.1999 | RM141.10 |

(III) **In respect of the Letter of Guarantee**

| | |
|---|---|
| (a) Total amount of loan advanced | RM6,000 |
| (b) The amount of the repayment as at 15.12.1999 | Nil |
| (c) The amount of instalment in arrears as at 15.12.1999 | Not applicable |
| (d) The total amount remaining due as at 15.12.1999 | RM6,000 |

It will be noticed that for the amount due under the letter of guarantee the affidavit refers to a sum of RM6,000 as opposed to the figure of RM16,000 demanded in the said advocates' letter but nothing turns on this since the lesser sum was the result of discounting two letters of guarantees given for the total sum of RM10,000 which had lapsed on 19 October 1999

with no claim made and thus released the plaintiff from any liability thereunder. It was no longer made an issue when the defendants' counsel argued the matter.

**Guarantee Given By Plaintiff**

It was argued that the sum of RM6,000 which the plaintiff guaranteed payment is neither a loan nor an amount due and payable because the plaintiff had not been called upon to pay under the guarantee. The issue turns on the interpretation of the terms and phrases in the letter of offer, which I have already set out, and the charge which I will set out later. As for the guarantee it is in these words:

> [Etc…]
>
> 27 October 1997
>
> The Director,
> Labour Department.
> Kuching
> [Etc…
>
> At the request of Soon Foom (S) Sdn Bhd ... "Company"… we hereby guarantee payment to you on demand not exceeding RM6,000-00 ... to meet all expenses that may be incurred for the purpose of fulfilling all obligations of the Company under the Terms and Conditions of the Licence to Employ Immigrant Workers to be issued under…
>
> This Guarantee shall be valid for 3 years with effect from 27th October 1997 until 27th October 2000 and shall be irrevocable during the period of this validity.
>
> All claims, if any, must be received by us in writing within the validity period of this Guarantee or latest within 14 days from the expiry of this Guarantee.
>
> Where no claims are received by us on or before the expiry of this Guarantee, our liability hereunder shall be terminated and shall be null and void and have no further effect whatsoever notwithstanding that it has not been returned to us for cancellation.
>
> [Signed for Overseas Union Bank (M) Bhd.]

The plaintiff's learned counsel argued that though the liability under that guarantee is contingent upon a claim being made it is nevertheless a banking facility granted to the defendant and payable by the defendant to the plaintiff on demand and, thereof, upon demand being made by the plaintiff it becomes an actual liability or debt. It was further contended that the defendant had covenanted under the charge to pay to the plaintiff upon

demand the sum due under the banking facilities "which the (defendant) may be or become liable … on banking account … or in any manner whatsoever ...". That paraphrase is taken from the following provision of the charge:

> WE, SOON FOOM (S) SDN. BHD. (33901-V), a company incorporated and registered in Malaysia under the Companies Act, 1965 and having its registered office at Lot 331, 9-1/2 Mile Kuching/Serian Road, 93250 Kuching, Sarawak (hereinafter called **"the Chargor") IN CONSIDERATION OF OVERSEAS UNION BANK (MALAYSIA) BERHAD (295409-T)**, a Company incorporated in Malaysia pursuant to the Companies Act, 1965 and licensed under the Banking and Financial Institutions Act, 1989 as a licensed bank and having its registered office at OUB Building, Leboh Pasar Besar, 50050 Kuala Lumpur and having a branch office or place of business at Nos. 1-3, Main Bazaar, 93000 Kuching, Sarawak, (hereinafter called **"the Chargee"**) granting or continuing to grant accommodation to the Chargor by way of fluctuating overdraft facility or otherwise up to the sum of **RINGGIT MALAYSIA THREE MILLION AND ONE HUNDRED THOUSAND (RM3,100,000.00) ONLY** (hereinafter referred to as **"the principal sum"**) **DOTH HEREBY PROMISE TO REPAY** the same on and only upon demand or to repay the balance which at the date of such demand shall be due and owing by the Chargor solely or jointly with any other persons firms or companies and whether as principal or surety or which the Chargor may be or become liable to the Chargee anywhere on banking account or accounts current or otherwise or in any manner whatsoever including the balance for the time being owing for or in respect of cheques, bills, notes, drafts or other negotiable instruments accepted paid or discounted for or on behalf of the Chargor either alone or jointly with another or others or for any other payments loan credits or advances made to or for the use or accommodation or on behalf of the Chargor whether alone or jointly with another or others pursuant to or in respect of or under any guarantee or letter of credit given established or opened by the Chargee for the Chargor or any contracts for the forward delivery of goods bills or specie or in respect of any other banking facilities whatsoever whether or not given upon or under any trust receipts or other security whatsoever or otherwise howsoever … .

For the purpose of their arguments, the plaintiff relied on *Baker v. Lloyd's Bank Ltd* [1920] 2 KB 322. In that case a firm on February 3 had £2934 in their account with a bank which held certain shares as security for an advance to the firm. The shares realised £812 after they were later sold by the bank and that amount was in excess of the advance. On the same day, that is February 3, the firm had discounted with the bank bills of exchange which matured later for which the firm became the debtors of the bank for £19,941. On the same day the firm became insolvent and assigned all their property to the plaintiff as trustees for their creditors with

the deed of assignment providing for payment to the creditors on the basis of a bankruptcy distribution of the property and that secured creditors should have the same rights as under a bankruptcy. The plaintiff sued to recover the sums of £2934 and £812 but the bank claimed a *lien* on those sums and also to set off a sufficient portion of £19,941 against those sums. The court there, at p.326, said this:

> In my judgment the bank is right and justified in relying upon those clauses. The plaintiff contends that those clauses do not assist the bank, and that no right either of set off or *lien* can be asserted in respect of the sums that might become due upon the bills, because at the date of the assignment the liability of the firm in respect of the bills was only a contingent, and not an actual, liability. It is true that the liability was contingent in this sense, that the amount that would become due in respect of the bills was not ascertained, but it was in my judgment certain that there would be a deficiency, and a deficiency of a considerable amount, in respect of the bill of which the firm were acceptors. They had at the date of assignment declared they were insolvent. With regard to the bills of which they were indorsers, an indorser undertakes that the bills on which his name appears as a party shall be paid at maturity. The declaration by the firm that they were insolvent and unable to meet their liabilities amounted to a repudiation of their ability to perform that undertaking. Accordingly, in my judgment, both by the rules of bankruptcy and common law there was an actual liability in respect of the bills.

That case, therefore, turns on the fact that though the liability was contingent because the bills were not due yet it was, nevertheless, an actual liability because the firm had by their declaration of insolvency repudiated their ability to pay and that it was certain that the bills cannot be met substantially. That the bills would be due for payment was also a matter of certainty. Reliance on this case without reference to the terms and phrases of the letter of offer and charge would not be appropriate.

The letter of offer states that the "banking facilities are subject to yearly review and repayable on demand". Another relevant term is in the charge where it says that the repayment includes sum which the defendant "may be or become liable". In so far as the plaintiff is concerned they can at anytime from now till 27 October 2000 be called upon by the Labour department to pay the sum of RM6,000. The plaintiff cannot rescind the guarantee and is therefore exposed to the liability though it may come to pass that the plaintiff may not be called upon at all to pay under the guarantee. Therefore there is no certainty that the plaintiff will be called upon to pay. Here lies the important difference between this case and *Baker v. Lloyd's Bank Ltd.* which makes reliance on that case untenable because in that case there is a certainty that the bank had to meet the

liability for the bills falling due. This case is not concerned with a liability under a bill but under a guarantee. However, it does appear from the term in the letter of offer that the giving of the guarantee is to be regarded as a banking facility. It is a banking facility as the defendant did not have to come up with RM6,000 cash to meet the guarantee which they otherwise would have if not for the banking facility. When the plaintiff demanded payment of the RM6,000 and it was not met by the defendant, it shows that the defendant was not able to pay and therefore will not be able to meet the liability should it arise under the guarantee. What the defendant could and should have done was to pay a sum of RM6,000 to the plaintiff to be placed on deposit for the contingent liability which the plaintiff may have to meet. Though the defendant had provided the same in another form and that is by way of a charge over their properties it serves to confirm that the provision of the guarantee is a banking facility repayable on demand. I am not unaware that the plaintiff in this case may be paid RM6,000 which in the end they do not have to pay out to meet their liability under the guarantee as when the Labour Department does not lay any claim under the guarantee. That should pose no problem as the RM6,000 when paid by the defendant to the plaintiff could be set aside by way of a deposit to the credit of the defendant but with the plaintiff having a *lien* on the same for the purpose of meeting their liability under the guarantee should a claim be made. In this way, it is a sum repayable on demand within the meaning of the phrase of the letter of offer.

It is also my view that such a contingent liability is covered by the said term of the charge. The liability to pay is there and it is dependent upon whether the Labour Department lays any claim. Such contingent liability is covered by the term of the charge: "may be or become liable". The sum of RM6,000 may be payable by the plaintiff to the Labour Department and thus "may be or become" liable to be paid by the defendant to the plaintiff. Furthermore, the sum of RM6,000 can be regarded as "due and owing" by the defendant to the plaintiff since it is "an advance", because the defendant did not have to come up with cash for the guarantee which they otherwise would have, and it was "for the accommodation" of the defendant "pursuant to the … guarantee". Though normally "advances" are normally associated with the giving of money but on the facts of this case it can be equated with the provision of the guarantee for the accommodation of the defendant.

I am not unaware of the case of *National Bank of A/asia Ltd v. Mason* where the guarantors had agreed to pay to the creditor "on demand ... all moneys which may from time to time hereafter be owing to the bank or remain unpaid from the customer on any account whatsoever … whether

contingently or otherwise including all moneys which the bank … may hereafter …. become liable to pay for or on account of the customer" after the bank had made available credit to the principal debtor. The payees of certain cheques had sued the guarantor and the bank in respect of them which the guarantor had indorsed to the principal company and which were then credited to the principal company's account and collected by the bank. The payees disputed the authority of the guarantor to make these endorsements. The bank argued that since the action against it for damages might be successful, and the bank could then seek reimbursement from the principal company, this was a contingent liability of the company to the bank within the meaning of the guarantee. The High Court unanimously rejected the bank's argument, holding that the guarantees did not extend to this possible liability of the principal company to the bank. The terms of the charge and the facts of the present case are different. The important term of "may be or become liable" was not present in that case. I turn now to the other arguments concerning non-compliance with O. 83 of the RHC 1980.

**Legal requirement**

The defendant contended, which I accept as correct, that O. 83 of the RHC 1980 applies, particularly, r. 3(3) and r. 3(6) which are in the following terms:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of –
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge.
>
> …
>
> (6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

It was held in *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608 that those provisions require a plaintiff to state the exact sum which a defendant is liable to pay. Non-compliance with r. 3(3) had been held to be sufficient to constitute cause against making an order of sale as was

done in *Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd* [1999] 3 CLJ 47 where there was a failure to state the amount of the advance and the repayments and *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim & Anor* [1995] 2 MLJ 537 where there was a failure to state the amount of repayments made and the amount of instalments in arrears. Those cases were decided on the particular transactions therein which are not similar to the present case. How has the plaintiff failed to comply? The defendant said that the plaintiff had not stated the amount of repayment made by the defendant. It will be recalled that the plaintiff had, in this regard merely stated "Not applicable" or "Not Applicable/Nil". Those words correctly described the actual position governing the banking facilities which do not require payment by the defendant unless demand is made by the plaintiff. Before the demand was made there was no question of repayment and neither was there any repayment. In this regard I am in agreement with *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd* [2000] 2 CLJ 73 that the chargee could not have stated what is required by O. 83 regarding particulars of the repayment. I would add that though O. 83 appears to require it, the maxim LEX NON COGIT AD IMPOSSIBILIA applies. The law does not compel a man to do that which he cannot possibly perform. The rules cannot be read to require the plaintiff to state the amount of repayment when there is none.

The defendant then contended that the overdraft facility was only RM2.45 million and not RM2.5 million. But that would be ignoring the fact that it was actually for RM2.5 million but with a condition that the amount would be reduced yearly by RM50,000 until it is reduced to RM1.5 million. Therefore, it is correct to say that the overdraft facility was RM2.5 million and the summation of the defendant based on the figure of RM2.45 million was therefore on a wrong premise.

The final complaint is directed at the interest charged for the Bankers Acceptance. I say it is final because though the affidavits filed on behalf of the defendant raised many other matters they were not referred to in the written submission of learned counsel for the defendant with the result that I treated them as being abandoned. Even if they fall to be considered, I would accept the written submission of counsel for the plaintiff that none of them afforded any ground for the court not to make an order of sale. The defendant's contention that the interest based on the principal sum of RM500,000 is wrong and should instead be RM488,234.66 and that the interest "based on BLR plus 3.5% per annum inclusive of 1% per annum for default interest" is wrong because it should be based on 1.75%. There is indisputable evidence adduced by the affidavits and by the certificate that the amount for this type of overdraft facility is RM500,000. The

defendant offered nothing in reply regarding that sum. As for the interest, whilst it is true that the interest rate is on **Interbank BA rate plus 1.75%** per annum, provided that it is not overdue because for overdue Bankers' Acceptance, cl. 7 of the letter of offer prescribes a different rate and it was on that rate that the interest was calculated and correctly I would add since there is no dispute that the Bankers Acceptance was overdue.

## Conclusion

In the premises, I make an order in terms of the originating summons dated 15 December 1999.